



Headquarters Policy Flash

FLASH 2002-11

DATE: March 1, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

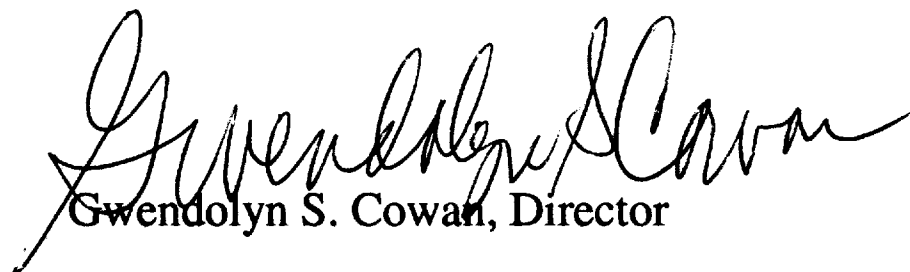
SUBJECT: **Correction of Flash 2002-08!**

SUMMARY: Headquarters Policy Flash 2002-08, dated February 12, 2002, contained an Item 1, entitled "Treatment of Commercially Valuable Information (CVI) Under Department of Energy (DOE) Management and Operating (M&O) Contracts." Attached to that Flash was a memorandum, dated February 4, 2002, providing guidance to Heads of Contracting Activities on CVI and transmitting the legal opinion on which the guidance was based.

FLASH 2002-11
March 1, 2002

A typographical error has been discovered in the legal opinion. Attached is a corrected copy of page 3 of the legal opinion. The revision inserts the word "not" after "does" and before "purport" in the middle of the second sentence on page 3.

Note: Please advise your HCA's or others who have need of this information about the typographical error included in the legal opinion. If you have any other questions please contact Bob Webb at (202) 586-8264 or via e-mail at Robert.Webb@pr.doe.gov



Gwendolyn S. Cowan, Director

Attachment

cc:
PPAG Members

Analysis

As stated at 10 C.F.R. § 1004.1, Part 1004 contains DOE's regulations that implement the FOIA and provide information concerning the procedures by which records may be requested by members of the public from DOE offices. The regulation is not directed to, and does not purport to cover, the creation of contractor rights to license CVI. Section § 1004.3(e) addresses, *inter alia*, application of the FOIA to contractor records that are the property of the Government but are not in possession of the Government. Specifically, 10 C.F.R. § 1004.3(e) states: "DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under FOIA (emphasis added)," and 10 C.F.R. § 1004.3(e)(2) states that, notwithstanding § 1004.3 (e)(1), CVI will "shall be made available only when they are in the possession of the Government and not otherwise exempt under 5 U.S.C. 552(b)(2)." The regulation continues, however, by confirming DOE's contractual rights to obtain contractor generated records and to determine their disposition:

(3) The policies stated in this paragraph:

- (i) Do not affect or alter contractors' obligations to provide to DOE upon request any records that DOE owns under contract, or DOE's rights under contract to obtain any contractor records and to determine their disposition, including public dissemination; and
- (ii) Will be applied by DOE to maximize public disclosure of records that pertain to concerns about the environment, public health or safety, or employee grievances.

10 C.F.R. § 1004.3(e)(3) (emphasis added).

The "Rights in Data" clause included in all M&O contracts (*see* 48 C.F.R. 970.5227-1 and 48 C.F.R. 970.5227-2) provides at paragraph (b)(1)(i) that the Government has ownership of all technical data and computer software first produced in the performance of the M&O contract, and in (b)(1)(ii) the Government has "unlimited rights" in technical data and computer software specifically used in the performance of the contract except as otherwise provided in the contract. Section 970.5227-2 (b)(iv) provides that the Government has the right to have such first produced data delivered to the Government at any time during the term of the M&O contract. Further, the "Access to and Ownership of Records" clause (*see* 48 C.F.R. 970.5204-3) provides in paragraph (a) that, unless exempted in (b), all records acquired or generated by the M&O contractor in the performance of the contract are the property of the Government and shall be delivered to the Government at any time during the term of the M&O contract. In paragraph (b), technical data and computer software first produced under the M&O contract are not exempted from Government ownership, the only relevant exceptions being protected CRADA information (in (b)(5)(ii)) and patent, copyright, mask work, and trademark application files and related contractor invention disclosures and documents (in (b)(5)(iii)).